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In The

Supreme Court of the United States

October Term, 1997

RANDON BRAGDON, D.M.D.,

Petitioner,

v.

SIDNEY ABBOTT, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE CITY OF LOS ANGELES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

Amicus curiae the City of Los Angeles submits this brief pursuant to Rule 37.5.

This case concerns whether a dentist may discriminate against a person with asymptomatic HIV disease despite the provisions of the Americans with Disabilities Act, 42 U.S.C. Sections 12101 *et seq.*

We write to share our AIDS legal expertise in support of the respondent as the jurisdiction which enacted the nation's first AIDS discrimination law, and which has long advised staff who face risks like those faced by the appellant dentist.

SUMMARY OF ARGUMENT

To create a system that permits professionals to refuse even remote risks when they serve the public is deeply divisive to society.

ARGUMENT

We agree with the Court of Appeals for the First Circuit that (1) respondent suffers a disability that impairs a major life function within the meaning of the Americans with Disabilities Act ("ADA"), 42 U.S.C. Sections 12101 *et seq.* and that (2) appellant failed to raise an adequate direct threat defense. *Abbott v. Bragdon,* 107 F. 3d 934 (1st Cir. 1997). The bases for this decision have been well discussed and developed in other briefs. We write to urge the Court to consider these arguments in

light of our experience as the jurisdiction which enacted the nation's first AIDS discrimination law, and which employs many who face threats in the workplace like those respondent presented appellant.

We advise staff who face such risk in far-less controlled circumstances than appellant's dental office. Our paramedics must pull bloody traffic accident victims out of jagged metal sheets, our police confront bloody, hostile knife-wielding suspects, and our firefighters rescue bleeding persons from smoky buildings littered with broken glass. They render care to all residents, without regard to HIV status, because they understand the fundamental shift in bloodborne infection control brought about by hepatitis B and HIV – that all blood, at all times, from all sources, must be treated *as if* it is infectious.

We enacted our AIDS discrimination law, the nation's first, Los Angeles Municipal Code Sections 45.80 *et seq.*, in 1985, shortly after movie star Rock Hudson's disclosure of his AIDS diagnosis created world-wide interest and concern about the epidemic for the first time.[1] We did so because it was unclear whether state or federal disability rights laws would be held to protect persons with HIV and AIDS, yet we had received persuasive testimony from city residents about wide-ranging acts of discrimination against them.

Upon commencing enforcement of our new law, we repeatedly found that AIDS discrimination was rooted in

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[1] Shortly thereafter, the cities of West Hollywood, San Francisco, Berkeley and Oakland enacted similar laws.

deep-seated fears of infectiousness.[2] For the public at large, these fears were based on its ignorance about what was meant by the statement that "HIV was 'contagious' ". We found that the public imported its own experiences with such infectious illnesses as colds or the flu, and society's past experience with such more-easily transmitted epidemics as cholera or the plague and, quite naturally, applied them to AIDS.

For our staff who encounter blood in the workplace, their concerns involved their unfamiliarity with the *degree* of risk posed by bloodborne disease. We found they needed training and assistance to learn to separate their irrational fears from professional assessment of the real, but remote, risk in their workplace, a risk reduced far further upon proper and consistent use of protective gear and protocols.

For complex reasons including the reticence of the media to be frank, the public did not understand at that time, the mid-to-late 1980s, what public health officials by then most clearly understood: that HIV's *vector of transmission* was fundamentally different.[3] To our surprise, we

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[2] For a general description of our enforcement experiences, see David I. Schulman, "AIDS Discrimination: Its Nature, Meaning and Function," 12 *Nova Law Review* 1113 (1988), an expanded version of our testimony to the Presidential Commission on the Human Immunodeficiency Virus Epidemic on March 16, 1988, during hearings held at Vanderbilt University in Nashville, Tennessee.

[3] In fact, the Centers for Disease Control (now the Centers for Disease Control and Prevention) had speculated a mere *fifteen months* after it published history's first AIDS case reports in June 1981 that AIDS might be transmitted by a bloodborne

found that we often resolved our investigations without litigation because our inquiries required respondents to learn how HIV actually *was* transmitted.[4]

We believe the insight that flowed from our experiences may be useful to the Court: that AIDS discrimination laws, whether specific to AIDS like our ordinance, or which incorporate HIV into their definition of disability like the Americans with Disabilities Act, are not just civil rights laws. The only case to approach this understanding is *Citizens for Uniform Laws v. County of Contra Costa*, 233 Cal. App. 3d 1468, 1475, 285 Cal. Rptr. 456 (1991), which held that state civil rights law did not preempt the county's AIDS discrimination law because it promoted the public health goal of combatting the AIDS epidemic by promoting HIV testing through protection of the rights of those who test positive. We are aware, and

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agent, 31 *Morbidity and Mortality Weekly Report* ("*MMWR*") 577 (Nov. 5, 1982). This speculation was strengthened considerably just two months later when it reported an infant had developed AIDS following a blood transfusion from a person later found to have it. 31 *MMWR* 652 (Dec. 10, 1982).

[4] A result so remarkable it became the basis for a presentation at the 3rd International Conference on AIDS, and an early AIDS law review article. See David I. Schulman, Mitchell Karp, and Norman Nickens, "Municipal AIDS Discrimination Laws as Public Health Education Tools for Preventing HIV Transmission" (abstract accepted for presentation at the 3rd International Conference on Acquired Immunodeficiency Syndrome, held June 1-5, 1987, in Washington, D.C.). See also Robert Roden, "Educating Through the Law: The Los Angeles AIDS Discrimination Ordinance," 33 *UCLA Law Review* 1410 (1986).

support, briefs submitted to the Court that argue similarly that AIDS discrimination laws perform public health functions.

But we wish to imply more. The encounter between the AIDS epidemic and law has called a new understanding into play, one we believe is important for the Court to take into account in deciding this case, in understanding that respondent's claim is not merely a disability rights claim to dental care. It is suggested further by another dimension to our enforcement experience.

We found that AIDS discrimination in some ways is like other forms of discrimination, in that it is the unfair treatment of individuals based upon irrational fears and prejudices about certain groups. But it is different even from that family of discrimination law – disability rights law – into which federal and state law has placed it. AIDS discrimination alone emanates out of an epidemic, and we believe it is this that must centrally affect the Court's deliberations in this case. Indeed, we believe it requires an AIDS jurisprudence.

This jurisprudence would recognize that epidemics threaten the ties that bind communities together. Some are driven to victimize others in order to bind the rest back together. AIDS discrimination laws combat this by establishing standards of reasonable behavior for members of a community, even when they are frightened, indeed, especially when they are frightened.

An AIDS jurisprudence would recognize that AIDS discrimination laws educate the public about the essential fact about HIV – how it is transmitted – and that education saves lives. But it would also recognize that AIDS

discrimination laws, by establishing fair standards of behavior, combat the ancient impulse to fracture during epidemics, and thereby maintains the health of the body politic.

From the beginning, we found that AIDS discrimination laws resist the fracture and blame so endemic to epidemics. They do so by establishing standards that express a practical, able-to-be-lived vision of how to behave when we are frightened. Our research suggests this is an unprecedented role for law.[5] Law characteristically *reinforced* societies' impulse to scapegoat, to blame.[6] And characteristically as well, they blamed people with already "spoiled identities".[7]

An eruption of a new jurisprudence, a new legal frame, though rare, is a traditional part of the legal process.[8] AIDS discrimination laws' way of establishing an ethical standard of behavior for frightened people would seem to be such an event. It recalls the exchange between the plague doctor Rieux and the journalist Rambert in Camus's *The Plague*.

Rieux disputes the journalist's contention that his dedication and effort were heroic:

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[5] See, for example, William H. McNeil, *Plagues and People* (1976).

[6] *Ibid.*

[7] See Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (1963), for comment about why those singled out are invariably those already possessed of "spoiled identities".

[8] See Robert Cover, "The Supreme Court 1982 Term: *Nomos* and Narrative," 97 *Harvard Law Review* 4 (1983).

> However, there's one thing I must tell you: there's no question of heroism in all this. It's a matter of common decency. That's an idea which may make some people smile, but the only means of fighting a plague is – common decency.[9]

Another character, Tarrou, explains this eruption of awareness further.

> All I maintain is that on this earth there are pestilences and there are victims, and it's up to us, so far as possible, not to join forces with the pestilences. That may sound simple to the point of childishness; I can't judge if it's simple, but I know it's true. You see, I'd heard such quantities of arguments, which very nearly turned my head, and turned other people's heads enough to make them approve of murder; and I'd come to realize that all our troubles spring from our failure to use plain, clean-cut language. So I resolved always to speak – and to act – quite clearly, as this was the only way of setting myself on the right track.[10]

It is this understanding that would be overlooked should the Court reject respondent's claim for dental care as a disqualified ADA claim. It arises amidst an epidemic, one that has provoked the best and worst in people, as Camus advised. We will not parse the line of cases that has denied ADA-based AIDS discrimination claims, despite the statute's and legislative history's "plain, clean-cut language", for that will be done in other briefs.

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[9] Albert Camus, *The Plague* (1972) (Stuart Gilbert trans., Vintage Books ed.) at 154.

[10] *Id.* at 236.

We argue, instead, that appellant's claim that he may refuse to care for the respondent despite overwhelming public health standards to the contrary, emotionally compelling as his claim is for himself and his loved ones, is no way to fight an epidemic. And though the authors of this brief themselves do not face the remote risk that would be faced by appellant, we are responsible for the safety of staff who do.

We understand how disturbing this prospect is for judges and others who think about the risk faced by loved ones who may be police, firefighters – or dentists. But we have learned through our work with staff, our regular lectures to trainees and to medical and dental students, and our work with the dental profession itself,[11] that adjustment to the remote but real risk of HIV in the workplace is just that, an adjustment. It is no excuse to victimize, to scapegoat . . . or to refuse care.

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[11] See David I. Schulman, "The Dentist, HIV and the Law: Duty to Treat, Need to Understand," *CDA [California Dental Association] Journal*, Sept. 1993, at 45.

CONCLUSION

For all the reasons set forth above, the judgment of the Court of Appeals for the First Circuit should be affirmed.

Dated: February 5, 1998

Respectfully submitted,

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